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Supreme Court, U.S.
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No. 03-1034

IN THE

Supreme Court of the United States

ESTATE OF BURTON W. KANTER, ET AL.,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The Tax Court keeps secret, even from the reviewing courts of appeals, the findings of fact and credibility judgments of its Special Trial Judges. By law, these trial judges are required after trial to submit reports to the Tax Court that contain the trial judge's findings of fact and opinion. Tax Ct. R. 183(b). By law, these findings of fact of the trial judge "shall be presumed to be correct" by the Tax Court and the Tax Court must give "due regard" to the trial judge's "opportunity to evaluate the credibility of witnesses." Tax Ct. R. 183(c). Nonetheless, the Tax Court overturns the factual findings of its trial judges, including their credibility findings, without revealing those findings to the parties or reviewing courts of appeals; without offering any reasons for rejecting those findings; and without even disclosing that the Tax Court has rejected those findings. Secret trial judge reports preclude the courts of appeals from engaging in proper appellate review. Federal statutes require that "all reports of the Tax Court * * * shall be public records." 26 U.S.C. §7641(a). The questions presented are:

1. Whether the due process clause or the governing federal statutes requires that the courts of appeals be able to review Tax Court decisions on the basis of the complete record, including the trial judge's findings of fact that, by law, the Tax Court must presume to be correct.

2. Whether Tax Court Rule 183 requires judges of the Tax Court to uphold findings of fact and credibility judgments made by their trial judges, unless those findings are "clearly erroneous," as the D.C. Circuit has held, or whether those findings and credibility judgments are entitled to no deference at all, as the Seventh Circuit held in this case.

RULE 14.1(b) STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Seventh Circuit:

1. Estate of Burton W. Kanter, Deceased
2. Joshua S. Kanter, as Executor of the Estate of Burton W. Kanter
3. Naomi Kanter
4. Commissioner of Internal Revenue, United States Department of the Treasury

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a to 97a) is reported at 337 F.3d 833 (7th Cir. 2003). The opinion of the Tax Court (Pet. App. 98a) is reported at 78 T.C.M. (CCH) 951 (1999). The orders of the United States Tax Court (Pet. App. 99a-112a) denying access to the Special Trial Judge's Rule 183 Report are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2003. A timely petition for rehearing was denied on October 21, 2003. Pet. App. 115a. A timely petition for a writ of certiorari was granted on April 26, 2004. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The relevant constitutional provisions, statutes, and rules are set forth at Pet. App. 116a to 121a.

INTRODUCTION

The questions presented here concern whether the Tax Court may insulate its decisions from proper appellate review by keeping secret the findings of fact of its trial judges. The Tax Court is legally obligated to presume these findings to be correct, but refuses to disclose them to the parties or the reviewing courts. A divided panel of the court of appeals determined that neither due process nor the relevant statutes obligated the Tax Court to disclose the legally-required findings of fact and opinion of the trial judge who presided over 28 days of live testimony, involving 60 different witnesses, at the trial of this case. It is undisputed that the Tax Court reached its ultimate decision – finding tax fraud and imposing over 30 million dollars of liability – only after reversing critical findings of fact, including credibility judgments, of the judge who had tried the case. The Tax Court's opinion not only provides no reasoned explanation

for this reversal; it contains no acknowledgement that the Tax Court reversed these findings at all. The trial judge's original Report has never been disclosed to the parties or to the reviewing courts.

STATEMENT

1. Structure of the Tax Court. Congress established the United States Tax Court as an Article I "court of record." 26 U.S.C. § 7441. "The Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts." *Freytag* v. *Comm'r*, 501 U.S. 868, 891 (1991). The Tax Court is an Art. I court whose sole function is the adjudication of tax disputes; it has no prosecutorial, investigative, or substantive rule-making powers. *Id.* at 890-91 (holding that Tax Court exercises only "judicial, rather than executive, legislative, or administrative power"); see also *id.* at 912-13 (Scalia, J., dissenting) (characterizing Tax Court as located in executive branch but engaged only in adjudication). In constituting the Tax Court as an Article I court in 1969, Congress granted the Tax Court additional judicial powers, such as the power to punish contempt, and completed the process of transforming the Tax Court from an executive agency into a full judicial institution. See generally H. Dubroff, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS 204-17 (1979); *id.* at 213 (noting applicability of Administrative Procedure Act to Tax Court was unsettled before 1969).

Tax Court decisions, like district court judgments, can be appealed only to the courts of appeals, with ultimate review in this Court. *Freytag*, 501 U.S. at 891. Congress also specifically legislated to require the courts of appeals to review decisions of the Tax Court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. § 7482(a); see *Comm'r* v. *Duberstein*, 363 U.S. 278, 291 n.13 (1960) (purpose of 26 U.S.C. § 7482(a) was to overrule earlier Court

decision and ensure that Tax Court findings of fact are reviewed just as intensively as District Court findings). See also *Freytag*, 501 U.S. at 891 ("This standard of review contrasts with the standard applied to agency rulemaking by the courts of appeals under §10(e) of the Administrative Procedure Act, 5 U. S. C. § 706(2)(A).").

In somewhat similar fashion to the way the District Courts are permitted to appoint magistrates, see 28 U.S.C. §631, the chief judge of the Tax Court "may, from time to time, appoint special trial judges * * *." 26 U.S.C. §7443A(a).[1] The Chief Judge may assign any proceeding for trial to a Special Trial Judge, "regardless of complexity or amount." *Freytag*, 501 U.S. at 873; see also 26 U.S.C. §7443A(b). The consent of the parties is not required. The Tax Court thus has plenary power to decide which cases are tried to Special Trial Judges.

Special Trial Judges ("STJs" or "trial judges") are "judicial officer[s]." See Tax Ct. R. 3(d). By statute, their salaries are 90% of those of Tax Court judges. 26 U.S.C. §7443A(d)(1). The STJs exercise a portion of the Tax Court's adjudicative function and possess the considerable powers associated with that function:

> They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.

Freytag, 501 U.S. at 881-882. See Tax Ct. R. 181 (STJs conduct trials, issue subpoenas, command production of evidence, rule on motions, conduct pretrial hearings, rule on

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[1] Special Trial Judges are at-will employees appointed at the discretion of the Chief Judge. They have no statutory term of office and serve at the pleasure of the Tax Court. See 26 U.S.C. § 7443A.

evidentiary questions, and conduct similar proceedings). In several types of proceedings, Congress has authorized these trial judges to issue the final opinion of the Tax Court. 26 U.S.C. §7443A(c). As this Court has recognized, Special Trial Judges exercise such "significant governmental authority" that they are "inferior Officers" of the United States whose appointment must comply with the requirements of Article II of the Constitution. 501 U.S. at 880-882.

The financially most significant cases the Tax Court may assign for trial to these judges, such as this one, involve claimed deficiencies that exceed $50,000. Such cases, when tried to a Special Trial Judge, are governed by the special procedures set forth in Tax Court Rule 183. Under that Rule, the Special Trial Judge conducts the trial and is legally required to make recommended findings of fact. After the trial and post-trial briefing, the Special Trial Judge must "submit a report, including findings of fact and opinion" to the Chief Judge. Tax Ct. R. 183(b). The Chief Judge then assigns a Tax Court Judge to review this Rule 183 Report. *Id.* Rule 183(c) provides: "The Judge to whom or the Division to which the case is assigned may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions." Tax Ct. R. 183(c).

Rule 183 requires that, in exercising his power to reach final decision, the Tax Court judge is constrained by the requirement that he "shall" presume correct the trial judge's factual findings and that he "shall" defer to the trial judge's opportunity to hear the witnesses:

> "*Due regard* shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the

> findings of fact recommended by the Special Trial Judge *shall be presumed to be correct.*"

Tax Ct. R. 183(c) (emphasis added.)

The Tax Court acknowledges that this Rule requires deference to the trial judge's judgments of credibility and findings of fact. See Pet. App. 108a (Tax Court order denying access to STJ findings but proclaiming that those findings were, in fact, accorded the required deference). Prior to the decision below, the D.C. Circuit, the only court to have squarely ruled on the issue, had long held, and the Tax Court bar had long understood, Rule 183(c) to mean that the Special Trial Judge's findings of fact are to be overturned only if clearly erroneous. See, *e.g.*, *Landry* v. *FDIC*, 204 F.3d 1125, 1133 (D.C. Cir. 2000); *Stone* v. *Comm'r*, 865 F.2d 342, 345 (D.C. Cir. 1989); 35 AM. JUR. 2d *Fed. Tax Enforcement* § 905 (2002) ("The Tax Court is required to review a special trial judge's factual findings according to the clearly erroneous standard."); 20A FEDERAL PROCEDURE, L. ED., INTERNAL REVENUE § 48:1274 (2000) (same).

2. The Tax Court's Secret Process of Decision-making.

a. This case arises because the Tax Court, in a reversal of a policy that had governed for over 40 years, now takes the position that it will keep *legally binding* findings of fact of its trial judges completely secret, including from the Article III appellate courts legally required to review the Tax Court's decisions. Even in a civil tax fraud case where credibility findings are critical, neither the taxpayer, nor the government, nor the court of appeals – even *in camera* – are permitted to see the trial judge's Rule 183 report or to review the full record underlying the Tax Court's decision. As Judge Cudahy observed below, the Tax Court is "unique among all the institutions in the law" in claiming the power to refuse to disclose the "presum[ptively] correct" findings of fact of a trial judge. Pet. App. 71a.

Even in the Tax Court this procedure is relatively new. The Tax Court adopted this secretive process only by abandoning a longstanding, transparent one. Long before the Tax Court became an Article I court of record, and long before the office of Special Trial Judge was created, Congress in 1943 first granted the Tax Court power to use "commissioners" – predecessors to Special Trial Judges – to try cases. Revenue Act of 1943, ch. 63, Sec. 503(b), 58 Stat. 72. The Tax Court in 1944 immediately promulgated Rule 48 which required that the commissioner's report be served on the parties and that the parties be permitted to file exceptions to the commissioner's findings before the Tax Court issued its final decision. Tax Ct. R. 48(c) (July 1, 1944 ed.).

This structure, including disclosure and the right to file exceptions, was carried forward in later Tax Court rules as the Tax Court changed the title of "commissioners" to "Special Trial Judges," increased the judicial powers of these trial judges, and turned the STJ into a "judicial officer." See former Tax Ct. R. 182(b), 60 T.C. 1149 (1973) (providing for service of the Special Trial Judge's report on each party and allowing each party to file objections to the report's findings); Tax Ct. R. 3(d). Until 1983, Tax Court Rules *required* routine disclosure in every case of the Special Trial Judge's report *and* provided the right to file exceptions.

In 1983, that changed when the Tax Court amended its rule in only one, odd respect: it eliminated mandatory, routine disclosure of the trial judge's report. See 81 T.C. 1069 (1983) (amending Rule 182 and renumbering it as Rule 183). The Tax Court changed nothing else about the trial judge or the Tax Court's role: the amended rule continued to require, in the exact same terms, that the Tax Court give "due

regard" and "presumed . . . correct" deference to the Special Trial Judge's findings of fact.[2]

The Tax Court has never offered any explanation for this 1983 amendment to its longstanding, consistent practice of disclosure. The Tax Court, unlike the federal courts or administrative agencies, employs no notice-and-comment process for issuing its rules of procedure. Indeed, it appears to have no formal process at all for issuing rules. Like the use of secret STJ reports, this lack of any formal process for promulgating rules of procedure is, as Judge Cudahy noted below, "oddly out of sync with prevailing practices in other areas of the law." Pet. App. at 77 n.2.[3] Taxpayers and

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[2] The language governing the Tax Court's review of the reports of Special Trial Judges had been contained in Tax Court Rule 182(d), which provided:

> (d) **Oral Argument and Decision**. The Division to which the case is assigned may, upon motion of any party or on its own motion, direct oral argument. The Division inter alia may adopt the [Special Trial Judge's] report or may modify it or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions. Due regard shall be given to the circumstance that the [Special Trial Judge] had the opportunity to evaluate the credibility of witnesses; and the findings of fact recommended by the commissioner shall be presumed to be correct.

Tax Ct. R. 182(d), 60 T.C. 1150 (1973). The 1983 amendments "renumbered [Rule 182(d)] as Rule 183(c), but the last sentence is unaltered." *Stone* v. *Comm'r*, 865 F. 2d 342, 345 (D.C. Cir. 1989).

[3] See 28 USC § 2071(b) ("Any rule prescribed by a court, other than the Supreme Court, under subsection (a) shall be prescribed only after giving appropriate public notice and an opportunity for comment."); Fed. R. App. P. 47(a)(1) ("Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice."); Fed. R.

reviewing courts can therefore only guess at the reasons for the 1983 change.[4]

The note that accompanied the amendment simply states that "the prior provisions for service of the [Special Trial Judge's] report on each party and for the filing of exceptions to that report have been deleted." Tax Ct. R. 183, 81 T.C. 1070 (adopted 1983). An accompanying press release also announced without explanation that "[t]he Special Trial Judge's report will not be served on the parties automatically, nor will the parties automatically be given an opportunity to file additional briefs setting forth exceptions to that report." United States Tax Court Press Release, January 10, 1984, reprinted in U.S. Tax Week, 1984 No.2, page 81, January 13, 1984.

b. The current Tax Court process is even more remarkable than the "mere" non-disclosure of the trial judge's original findings. As the government now concedes, the Tax Court employs a procedure that makes it impossible for anyone, including the parties, the reviewing court of appeals, or this Court, to determine whether the Tax Court has overturned the findings, including the credibility findings, of the judge who tried the case – and if so, why.

In every reported decision since the 1983 disclosure repeal, the final decision of the Tax Court begins with a

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Civ. P. 83(a)(1) (a district court must "giv[e] appropriate public notice and an opportunity for comment" before making and amending local rules).

[4] This change was made during pendency of a highly visible case in which the Tax Court had publicly reversed the findings of its trial judges, only to be later reversed by the D.C. Circuit for giving insufficient deference, under its own rules, to the trial judge's findings. See *Rosenbaum* v. *Comm'r*, 45 T.C.M. (CCH) 825 (1983), *rev'd sub nom. Stone* v. *Comm'r*, 865 F.2d 342 (D.C. Cir. 1989).

boilerplate statement that the Tax Court judge "agrees with and adopts the opinion of the Special Trial Judge." See Pet. App. 3a, 98a (emphasis added). Following that statement is an opinion issued in the name of the Special Trial Judge. "[T]here exists not a single Tax Court decision since the adoption of current Rule 183 where a Tax Court Judge has purported to modify or reverse a finding of a Special Trial Judge." Pet. App. 73a.

As the government now concedes, that boilerplate language does not mean that the final "opinion" is the same as the Rule 183 "report" with its original findings of fact intact. See Gov't Br. in Opp'n, *Ballard v. Comm'r* ("*Ballard* Opp."), No. 03-184, at 13 n.3 (filed Oct. 6, 2003) (acknowledging that the boilerplate language in Tax Court opinions might reflect the current "views" of the STJ, not the original findings, and that those original findings might have been "revised"). Rather, that formulaic recitation masks – indeed we find it difficult to avoid any conclusion but that it is designed to mask – a process by which the Tax Court changes findings of fact without any notice to the parties and without leaving a trace in the record. The Tax Court judge apparently discusses such changes (or perhaps does not discuss them at all) and privately "persuades" the trial judge (employed at the will of the Tax Court) to sign a new opinion with completely modified findings. As in this case, only that new opinion is made available to the parties or the courts of appeals.

Before 1983, decisions expressly indicated when the Tax Court judge rejected the trial judge's findings. Opinions would state that "we disagree with the Special Trial Judge,"[5] or that the Tax Court had made "some modifications" to the trial judge's report.[6] But once the Tax Court changed its rule

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[5] See, *e.g.*, *Rosenbaum*, *supra*, n.4, 45 T.C.M. at 827.

[6] See, *e.g.*, *Taylor* v. *Comm'r*, 41 T.C.M. (CCH) 539 (1980).

to deny access to the trial judge's report, the Tax Court never again manifested any such disagreements in public. Judge Cudahy concluded, and the Commissioner does not deny, that the public show of unanimity on every factual finding in every case over two decades signals that the Tax Court, in at least some cases, overturns or modifies STJ original findings of fact through an unreviewable process that leaves no trace in the public record. Pet. App. 74a. In any given case, there is no way to know whether such modification has occurred.

The Tax Court need not hear any witnesses or take any new evidence before issuing its decision and did not do so in this case. The only materials before the Tax Court judge were the trial judge's report and the trial record. If the Tax Court rejects the Special Trial Judge's presumptively correct findings, neither the parties nor the reviewing court have any way to know of that fact. The taxpayer is denied the opportunity to challenge that rejection, either by motion in the Tax Court[7] or on appeal, and the reviewing court is unable properly to evaluate the findings contained in the Tax Court's final decision. Without knowing whether the Tax Court decision rests on findings fundamentally different from those in the report of the judge who tried the case, the court of appeals cannot determine whether the Tax Court has properly followed the requirements of Rule 183. Nor can the court of appeals meaningfully judge on the record as a whole whether the findings of fact in the newly minted Tax Court opinion are clearly erroneous. Absent the Rule 183 report, the court cannot evaluate the Tax Court's decision in the manner prescribed by law. As Judge Cudahy concluded, "I do not believe that the concealment behind that [boilerplate] verbal formula allows this court to conduct meaningful appellate review." Pet. App. 96a-97a. Numerous

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[7] See Tax Ct. R. 161 (motion for reconsideration of findings or opinion); Tax Ct. R. 162 (motion to vacate or revise decision).

commentators similarly have concluded that the Tax Court practice violates due process or other federal law.[8]

3. Tax Court Proceedings in This Case. Burton W. Kanter was one of the leading estate-tax lawyers in the country, a prolific writer on tax planning, and an adjunct professor of law for nearly 15 years at the University of Chicago Law School. Kanter and others sought review in the Tax Court of notices of deficiency that, with interest and penalties, totaled more than $30 million. The notices did not claim fraud, but the Commissioner later amended his answer to allege fraud. All income from the transactions at issue was fully reported by the entities that actually received the money; the dispute was whether the income should have been reported by Kanter personally, as the Commissioner claimed, or by the entities that actually received the monies, as Kanter claimed.

The Chief Judge of the Tax Court assigned the trial to Special Trial Judge Couvillion. That trial before Judge

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[8] See, *e.g.*, Eric Winwood, *The Reclusive Report: The Tax Court Denies Due Process By Not Disclosing Special Trial Judge Reports To Litigants*, 2004 FED. CTS. L. REV. 3; Leandra Lederman, *Transparency and Obfuscation in Tax Court Procedure*, 102 TAX NOTES 1539, 1541 (March 22, 2004) (non-disclosure of the STJ report improperly "shields the [tax] court from accountability"); Gerald A. Kafka & Jonathan Z. Ackerman, *Fact-Finding in the Tax Court: Access to Special Trial Judge Reports*, 91 TAX NOTES 639, 642 (April 23, 2001) ("There seems to be little justification for the Tax Court to shroud its judicial processes from the public and the parties to a greater extent than any other federal court."); Cornish F. Hitchcock, *Public Access to Special Trial Judge Reports*, 2001 TAX NOTES TODAY 199-41 (Oct. 12, 2001) (non-disclosure of STJ report violates common-law and constitutional rights of access to judicial documents). One of these authors is not the only Kafka one can imagine taking an interest in the legal procedure utilized by the Tax Court. *Cf.* F. Kafka, The Trial (1925).

Couvillion consumed five weeks and "generated almost 5,500 pages of transcript, more than 4,600 pages of briefs and thousands of exhibits consuming hundreds of thousands of pages." Pet. App. 3a. Judge Couvillion prepared and filed the required Rule 183 report after taking four years to evaluate the massive record. J.A. 7. His report included findings of fact, critical judgments of credibility, and legal conclusions on the issue of fraud. The Chief Judge then assigned Tax Court Judge Dawson to review the report. Pet. App. 113a-114a.

Judge Dawson had the report under review for fifteen months. He heard no new witnesses and took no new evidence. At the end of that time, Judge Dawson issued the Tax Court's decision that found Kanter liable for tax fraud. *Inv. Research Assocs., Ltd.* v. *Comm'r*, 78 T.C.M. (CCH) 951, 963 (1999).

Two judges of the Tax Court then came forward to Tax Court counsel and informed him that Judge Dawson's decision had completely reversed the central findings of credibility and intent contained in the trial judge's Rule 183 report. That report had found Kanter and others not liable for fraud and not liable even on the underlying issues of personal tax liability.[9] This evidence is uncontradicted and the Commissioner does not contest these factual assertions.

These two Tax Court judges (one a regular Tax Court judge, the other the Chief Special Trial Judge) informed counsel:

> "¶4 * * * [I]n his original report submitted to the Chief Judge pursuant to Rule 183(b), Special Trial Judge Couvillion concluded that payments made by the [taxpayers] were not taxable to the

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[9] See *Declaration of Attorney Randall G. Dick*, filed in *Inv. Res. Assoc.* v. *Comm'r*, Docket No. 43966-85, reprinted at App. 5a-7a.

> individual Petitioners and that the fraud penalty was not applicable.
>
> "¶5 * * * That substantial sections of the opinion were not written by Judge Couvillion, and that those sections containing findings related to the credibility of witnesses and findings related to fraud were wholly contrary to the findings made by Judge Couvillion in his report. The changes to Judge Couvillion's findings relating to credibility and fraud were made by Judge Dawson."

App. 6a. A third judge of the Tax Court confirmed that Judge Dawson "had made an outright rejection of credibility findings made by a Special Trial Judge." *Id.* at ¶7.

Witness credibility was central to this tax fraud case, as it often is in such cases. See, *e.g.*, *Laird* v. *Comm'r*, 68 T.C.M. (CCH) 1991 (1994); *Platshorn* v. *Comm'r*, 64 T.C.M. (CCH) 1457 (1992). The government bears the burden of proving, by clear and convincing evidence, that a taxpayer has acted with intent to defraud the government. See, *e.g.*, *Pittman* v *Comm'r*, 100 F.3d 1308, 1312-13 (7th Cir. 1996). In this case, 60 witnesses testified at the lengthy trial; the trial judge directly questioned 40 of them.

The Tax Court's final opinion rests upon numerous explicit credibility determinations.[10] But the record reflects neither the Special Trial Judge's original findings to the contrary on these matters, nor the Tax Court's reversal of those findings. Nor does it explain or justify that reversal

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[10] See, *e.g.*, 78 T.C.M. at 1060 ("We find Kanter's testimony to be implausible."); *id.* at 1079 ("The testimony of Thomas Lisle, Melinda Ballard, Hart, and Albrecht is not credible."); *Id.* at 1083 ("we find Ballard's testimony vague, evasive, and unreliable"); *id.* at 1104 ("Kanter's self-serving testimony is not persuasive"); *id.* at 1140 ("[T]he witnesses presented on behalf of IRA in this case were obviously biased, and their testimony was not credible.").

(under any standard of review at all). The final decision simply concludes: "Kanter's testimony at trial was implausible, unreliable, and sometimes contradictory. We did not find it credible." *Inv. Research Assocs., Ltd.*, 78 T.C.M. (CCH) at 1085.

In response to three separate motions filed shortly after the Tax Court's decision, the Tax Court refused to have the trial judge's report released or made part of the record. Pet. App. 99a, 104a, 107a. Rather than providing the report that would enable the Article III appellate court independently to review the Tax Court decision for compliance with law, the Tax Court simply professed its own compliance with all legal requirements: "[i]n reviewing the Special Trial Judge's report, Judge Dawson gave due regard to the fact that Special Trial Judge Couvillion evaluated the credibility of witnesses . . . and he treated the findings of fact recommended by the Special Trial Judge as being presumptively correct." Pet. App. 108a.[11]

4. The Seventh Circuit's decision. A divided panel of the court of appeals affirmed. The majority concluded that "the Tax Court's final opinion is the STJ's report" and hence that Petitioners' constitutional claims were "moot" and "immaterial." Pet. App. 7a. This conclusion reflected understandable confusion, caused by the Tax Court's opaque process, which concealed the fact that the Tax Court's opinion is *not* necessarily the trial judge's "report." The

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[11] A subsequent Tax Court order, issued after the declaration was filed that described the two Tax Court judges' disclosure to Tax Court counsel of the reversals of findings contained in the Tax Court's opinion, is more ambiguous about whether Judge Dawson deferred to the findings contained in the original report. See Pet. App. 102a (stating that the Tax Court had adopted the "findings of fact and opinion" of the Special Trial Judge, but not stating that the Tax Court had adopted the findings and opinion contained in the Special Trial Judge's Rule 183 Report).

Commissioner no longer defends the Tax Court opinion on this ground. See *supra* at p.9. The government acknowledges that the Tax Court may have dramatically changed the findings of fact and credibility judgments in the original trial judge report.

Alternatively, the court of appeals held that "even if * * * the phrase 'agrees with and adopts' masks what is in fact a quasi-collaborative judicial deliberation in which an STJ's initial findings are malleable," Pet. App. 7a, neither due process nor applicable federal statutes are violated when the Tax Court changes "malleable" trial-judge findings without the record reflecting or justifying those changes.

The foundation of this conclusion was the court's view that Rule 183 does not constrain at all the reviewing powers of the Tax Court judge. In conflict with the D.C. Circuit's view that the Rule imposes a "clearly erroneous" standard for review by the Tax Court of the Special Trial Judge's findings of fact, the court below concluded that the Tax Court Rules do not "prescribe any particular level of deference due the STJ's report." Pet. App. 8a. Moreover, the court noted that the final decision is signed by both the Tax Court judge and the Special Trial Judge. Thus, although the Special Trial Judge serves at the pleasure of the Tax Court, the court concluded that both judges must have "agree[d]" on whatever secret revisions the Tax Court judge made to the trial judge's original findings. Pet. App. 7a.

Judge Cudahy dissented. In his view, the Tax Court's refusal to disclose the original trial judge's findings of fact made it impossible for the Article III reviewing court properly to review the findings contained in the Tax Court's ultimate decision in violation of due process. Congress specifically required the appellate courts to ensure that Tax Court findings of fact are not clearly erroneous. *Duberstein,* 363 U.S. at 291 n.13. As Judge Cudahy noted, proper

application of that standard requires an appellate court to overturn a finding of fact when,

> although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . When findings are based on determinations regarding the credibility of witnesses, [clear error review] demands *even greater deference* to the trial court's findings. . . .

Pet. App. 89a-90a (quoting *Anderson* v. *City of Bessemer City, 470* U.S. 564, 573-75 (1985)) (citations omitted).

Yet absent the original trial judge's findings and report, Judge Cudahy concluded, the reviewing court simply cannot perform proper "clearly erroneous" review. The reviewing court, confronting a finding of fact, cannot tell whether that finding is due the "greater deference" owed to actual trial judge findings, or whether that finding is due considerably less deference precisely because it reflects a *rejection* of the original trial judge's findings.

As Judge Cudahy summarized, "If we are to give 'even greater deference' to the findings of a judge who has heard the witness whose credibility is at stake, we must inevitably give less deference to the judge who subsequently reverses those findings." Pet. App. 90a. But without the Special Trial Judge's original findings and report, it is impossible to identify which findings are made by the trial judge and which involve new or modified findings of the Tax Court judge. Judge Cudahy concluded that this system made it impossible for him to perform his legal duty to provide proper appellate review. Pet. App. 94a. He reasoned that this was so whether or not the Tax Court owed any particular level of deference, or no deference at all, to the trial judge's findings. Judge Cudahy therefore concluded that the Tax Court's practice, which regularly and systematically frustrated proper appellate review, violated due process. He also found that

the relevant federal statutes should be construed to require transparency in Tax Court proceedings and to prohibit the Tax Court's practice of non-disclosure. Pet. App. 83a.

SUMMARY OF ARGUMENT

I. Secret trial judge reports violate due process and the appellate review statute, 26 U.S.C. §7482(a), by preventing proper appellate review in the courts of appeals. Tax Court Rule 183(c) requires the Tax Court to give deference to the trial judge's findings of fact, to presume those findings correct, and to afford due regard to the circumstance that the trial judge had an opportunity to observe witnesses and judge credibility. That Rule gives the trial judge's findings legally operative effect in the Tax Court's final decision. The denial of access to findings of fact that, by law, carry legal weight in the final decision of a formal adjudication violates due process. The Tax Court's practice precludes the Article III reviewing courts from determining whether the Tax Court gave proper legal deference to the trial judge's findings and properly treated them as presumptively correct.

That the Tax Court's practice violates due process is confirmed by the longstanding historical and contemporary practice of every other federal judicial or administrative institution, all of which view disclosure of the original factfinder's or hearing officer's report to be integral to fundamentally fair adjudicative process. Application of the balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976) also confirms that the Tax Court's practice violates due process. Disclosure of the trial judge's findings can only enhance accurate decisionmaking and entails virtually no cost, given that these findings must already be prepared and filed with the Tax Court. The proper outcome of the *Mathews* balance is reflected in the consensus of both Congress and other federal rulemakers that such findings must be disclosed in all other federal judicial and administrative adjudications.

II. Rule 183 permits the Tax Court to overturn a trial judge's findings only if "clearly erroneous." The plain language and history of the Rule make this clear. See *Stone* v. *Comm'r*, 865 F.2d 342, 345 (D.C. Cir. 1989). The government's post-hoc litigation position, that the Rule requires no deference at all from the Tax Court to its trial judges, is insupportable.

III. Even if the Special Trial Judge's report were considered of no formal legal relevance to the Tax Court's final decision – as the government argues - due process would still require the report's release. First, failure to disclose the trial judge's original findings precludes the court of appeals from properly applying the clear error standard of review, as this Court has defined that standard. See *Anderson* v. *Bessemer City*, 470 U.S. 564 (1980).

Second, if the Tax Court judge were somehow viewed as an original factfinder, Petitioners would be entitled as a matter of due process to see all the information in front of that judge when he makes his findings of fact and to address before that judge the factual issues on the basis of which his original factfinding determinations are made.

IV. Secret Special Trial Judge reports also violate the transparency and disclosure requirements in the statutes that govern Tax Court proceedings. From the inception of the modern income tax, Congress has imposed special requirements of transparency and openness for every phase of Tax Court proceedings. 26 U.S.C. §7461(a); §7459(b). Section 7461(a) requires that all "reports of the Tax Court and all evidence received by the Tax Court shall be public records." The Special Trial Judge's report is included in those terms. And if there were any doubt, the common-law right of access to judicial records would counsel in favor of interpreting these statutes to include the Special Trial Judge's Report.

V. Finally, this Court should exercise its supervisory power to require that the courts of appeals review Tax Court decisions on the same basis as that used for all other federal courts and, indeed, all agencies by requiring that the record include the report of the trial judge who presided at trial, heard the witnesses, and made recommended, legally operative findings. The Tax Court's practice of secrecy is a stark example of a "depart[ure] from the accepted and usual course of judicial proceedings" that warrants this Court's intervention. See SUP. CT. R. 10(a).

ARGUMENT

I. DUE PROCESS AND THE APPELLATE REVIEW STATUTE REQUIRE DISCLOSURE OF A TRIAL JUDGE'S FINDINGS OF FACT THAT HAVE LEGALLY OPERATIVE WEIGHT IN A COURT'S FINAL DECISION.

The government has some discretion, within constitutional constraints, to choose how to construct institutions of formal adjudication. Once it creates judicial (or administrative) institutions with certain structures, however, due process requirements attach. The Tax Court need not use Special Trial Judges, but once it does, due process requires that it disclose the presumptively correct findings those judges have made.

Tax Court Rule 183 (c) provides that: "Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Tax Ct. R.183(c). That rule embodies and reflects traditional understandings concerning how to structure fundamentally fair and accurate adjudicative processes. The Courts of Appeals are, of course, bound to review decisions of the Tax Court for compliance with law, including compliance with Rule 183. See 26 U.S.C. §7453; see, *e.g.*, *Service* v. *Dulles*, 354 U.S. 363, 388

(1957) (agency legally required to comply with its own regulations).

Rule 183(c) by its plain terms commands deference by the Tax Court to the Special Trial Judge's original findings of fact. As long as that Rule requires any level of deference at all from the Tax Court, the findings of the trial judge are legally required to have weight in the Tax Court's ultimate decision. Yet the Tax Court's practice makes it literally impossible for a reviewing court to determine whether the Tax Court has complied with Rule 183(c) by giving those findings the required deference. Without seeing the report filed by the judge who tried the case, a court of appeals cannot assess whether the Tax Court has properly construed and applied its legal obligations to "presum[e] correct" the STJ's findings and to give "[d]ue regard" to the STJ's opportunity to evaluate the credibility of witnesses.

A. A Reviewing Court Must Have Access To The Information Necessary To Evaluate The Decision Before It.

Due process requires that a court reviewing a legal determination must have before it the information necessary to determine and evaluate the basis upon which a lower court has made its decision. Long ago, this Court recognized the basic principle that due process is denied, even in administrative decisions, when an adjudicator bases its decision upon facts that it "never . . . disclosed." *Ohio Bell Tel.* v. *Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 300 (1937). As Justice Cardozo concluded, "From the standpoint of due process – the protection of the individual against arbitrary action – a deeper vice is this, that even now we do not know the particular or evidential facts . . . on which [the state regulatory Commission] rested its conclusion. Not only are the facts unknown; there is no way to find them out." *Id.* at 302. This incomplete record not only made the Commission's proceedings a violation of due process, but

further violated due process by rendering the appeal "an empty for[m]," denying the "opportunity in connection with a judicial review of the decision" to properly challenge the basis for the Commission's decision. *Ibid.*

The Tax Court's procedure of keeping secret the legally operative findings of fact made by the trial judge arbitrarily denies Petitioners the adjudication to which they are legally entitled before the appellate court. Due process requires that the parties and courts have access to any initial findings of fact that have legally operative effect in a formal adjudication. This is as true of the appellate courts as it is of the trial courts; where an appeal is granted, it must be a meaningful one. See *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985) (requirements of due process apply on appeal).

The proceedings before the courts of appeals – which are, absent certiorari review in this Court, the only Article III tribunal that hears the cases that arise in the Tax Court – would violate due process were those courts to render decisions after being presented with only random portions of the record below. Similarly, if appeals were based on biased records – if the Tax Court only included in the record findings or evidence that favored the winning party – due process would be violated. Yet these scenarios are much like the context here: the Tax Court suppresses from the record the original findings of the trial judge that are contrary to those of the Tax Court itself. Appeals are being decided on the basis of partial records – partial both in the sense that that the record is incomplete and that the record is purged of all findings contrary to those of the Tax Court judge.

A fair adjudication in the court of appeals cannot lawfully be denied by a government process that arbitrarily eliminates those rights. Due process requires that a court adjudicating a case be permitted to do so on the merits. See *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429, 433-34 (1982) (determination of a cause without "the opportunity to present

[the] case and have its merits fairly judged" violates due process); *West Ohio Gas* v. *Pub. Utilities Comm'n*, 294 U.S. 63, 68-69 (1935) ("To make [judicial] review adequate the record must exhibit in some way the facts relied upon by the court. . . If that were not so, a complainant would be helpless. . . . A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.").

Absent the trial judge's original findings, it is impossible for the Article III courts to evaluate whether the Tax Court indeed presumed correct the trial judge's findings. Neither in the courts of appeals, nor in the Tax Court through a motion for reconsideration or to vacate, can a litigant protect its right to have the trial judge's findings properly respected. A Tax Court judge could overturn those findings for any reason at all – indeed, for personal, political, or ideological reasons – with no federal court review possible.[12] As a categorical rule, due process requires that findings of fact that, by law, carry legal weight in the ultimate adjudicative decision under review must be disclosed. *Cf. Crawford* v. *Washington*, 124 S. Ct. 1354, 1373 (2004) (constitutional guarantees of proper legal process must be protected through categorical rules to withstand inevitable pressures in controversial cases).

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[12] In this case, the Fifth Circuit on a petition for mandamus recently issued a strongly worded ruling rebuking the Tax Court for attempting to continue to impose penalties on one of the taxpayers even after the Fifth Circuit's reversal of the Tax Court's judgment of fraud against him. See *In re Estate of Lisle*, No. 03-61075 (5th Cir. Jan. 7, 2004), reprinted at App.1a (cautioning Tax Court not to exceed scope of the Fifth Circuit's remand after Judge Dawson asserted that he would use the remand to impose new penalties for negligence and substantial underpayment); see also *Lisle* v. *Commissioner*, Docket No. 21555-91 (T.C. Nov. 19, 2003) (Judge Dawson's underlying order), reprinted at App. 3a.

B. Uniform Historical And Contemporary Practice Make Clear That Disclosure Of A Trial Judge's Findings Of Fact Is Essential To Fair, Formal Adjudication.

Disclosure of the findings of a trial judge, hearing officer, or analogous initial factfinder is indeed such a fundamental premise of proper judicial (and even administrative) process that Petitioners have been unable to find *any* area in modern federal law where such disclosure is not routine. Whether the initial factfinder is a special master, a magistrate, a bankruptcy judge, or an administrative law judge – all of whom may have lesser responsibilities than a trial judge who presides over a 28-day trial involving constitutionally protected liberty and property interests – Congress or the relevant federal rules require routine disclosure of initial findings of fact.

The report of a magistrate judge is served on the parties and becomes part of the record. 28 U.S.C. § 636(b)(1)(C). A special master's report must be filed with the District Court and served on the parties (unless the District Court directs otherwise). See FED. R. CIV. P. 53(f); 53 (g)(1),(2). The initial findings of a bankruptcy judge are part of the record. FED. R. BANKR. P. 8013. Even in the administrative agency area, regardless of the nature of the private interest affected, the report of an initial hearing officer is a critical and routine part of the record. The Administrative Procedure Act (APA), 5 U.S.C. § 557(c)(3), requires that "[a]ll decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of (A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; . . .." See also 5 U.S.C. §706 ("the court shall review the whole record or those parts of it cited by a party...").[13]

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[13] The framers of the APA considered these to be critical requirements of properly and fairly structured adjudicative

As the government itself acknowledged below, "in every milieu except that of the Tax Court, the document containing the findings or recommendations of the official conducting the trial are available to a court reviewing the operative decision." Pet. App. 71a (Cudahy, J., dissenting). That is so even when, unlike here, constitutionally protected liberty and property interests are not at stake. It is also so even when, also unlike here, those original findings do not have legal weight in the final decision at issue. See *infra* pp. 34-39.

This consistent, longstanding practice of all federal judicial and administrative institutions confirms that an integral aspect of fair, formal adjudication is that all findings of fact, particularly those that carry legal weight in the final adjudicative decision, must be disclosed. Indeed, this historical practice is so consistent and deeply embedded that, even standing alone, that practice itself would suffice to establish a due process violation. *Cf. Burnham* v. *Superior Court*, 495 U.S. 604, 609 (1990) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy and White, JJ.) ("due process 'mean[s] a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights'") (quoting *Pennoyer* v. *Neff*, 95 U.S. 714, 733 (1978)).

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proceedings, particularly "on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide . . . ." Report of the Committee on Administrative Procedure, Administrative Procedure in Government Agencies 51 (1941). See also 2 Pierce, ADMINISTRATIVE LAW TREATISE § 11.6 at 822 (2002) (the "initial decision of the ALJ" must form part of that record in any "formal adjudication").

C. Disclosure Is Also Required By The *Mathews* v. *Eldridge* Balancing Test.

Application of the *Mathews* v. *Eldridge* balancing test generates the same constitutional result. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). See also *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2646-2650 (2004) (controlling plurality opinion of O'Connor, J.) (applying *Mathews*).

Mathews requires the Court to weigh (1) the private interests at stake; (2) the effect on decisionmaking accuracy of the procedure sought; and (3) the administrative or other burdens of that procedure. 424 U.S. at 335. Petitioners are not seeking a novel procedure that this Court must assess on a blank slate: Congress and the federal courts have already weighed these interests and concluded in every other context that accurate and fair adjudication requires disclosure of similar initial findings.

Indeed, it is not clear that Petitioners, in seeking disclosure, are even seeking the kind of additional procedure to which *Mathews* was addressed. The trial judge must already prepare and submit to the Tax Court the report at issue. Petitioners are seeking *disclosure* of a report and findings that must already be prepared, not an additional procedural step, such as a requirement that such a report be prepared. As Judge Cudahy found, "[t]he Tax Court has not denied that a document containing the original findings of the STJ exists, yet it refuses to include this document in the record on appeal." Pet. App. 71a.

More formally, with respect to prong (1) of *Mathews*, the private interests at stake, both constitutionally protected property and liberty interests are implicated when tax fraud is alleged. Government action that seriously damages an individual's reputation in the course of taking away property implicates both liberty and property interests. See, *e.g.*, *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971); *Owen* v. *City of Independence*, 445 U.S. 622, 682 n.13

(1980). A civil tax fraud action is a quasi-criminal proceeding; only a criminal trial would involve weightier interests. See, *e.g.*, *Addington* v. *Texas*, 441 U.S. 418, 424 (1979) (noting that "[t]he interests at stake in [civil fraud] cases are deemed to be more substantial than mere loss of money" because of the "risk to the defendant of having his reputation tarnished erroneously"); *Guenther* v. *Comm'r*, 889 F.2d 882, 884 n.2 (9th Cir. 1989) (precedent from criminal cases relevant to due process in tax fraud proceedings before Tax Court, because "civil fraud is such a serious charge").

With respect to prong (2), review based on the whole record that was before the tribunal whose decision is under review has long been viewed as essential to accurate decisionmaking in formal adjudications. If Rule 183 requires the Tax Court to defer at all to the trial judge's original findings, it is metaphysically impossible for the courts of appeals to engage in accurate review without those findings. But even were the Rule to require no formal deference, accurate review would still require review on the whole record. Courts of appeals commonly reverse agency decisions under the substantial evidence test, for example, when an agency has reversed the findings of its administrative law judges and failed to provide a sound explanation for doing so, even when the agency itself has *de novo* factfinding power. See *infra* note 15. This pattern confirms the principle, reflected in central commitments of statutes like the APA, that accurate decisionmaking requires courts to review adjudications on the basis of the whole record.

Finally, with respect to prong (3), disclosure implicates virtually no administrative burden at all. The only "burden" is that disclosure would enable the courts of appeal to review the Tax Court's decisions on the basis of the whole record. But proper accountability to appellate review cannot count as a burden, even a minimal one, for due process analysis. It

can only be a benefit. At no time has the government, either through a Tax Court opinion or in post-hoc litigation, advanced even a plausible governmental interest in maintaining this unique, secretive process. There is no cost at all that due process can recognize to the Tax Court of disclosing a report that must already be prepared and filed. Disclosure of initial, recommended, and other findings of fact is required in adjudications that do not implicate constitutionally protected interests at all. The *Mathews* balance requires at least as much here.

D. The Appellate Review Statute Also Requires Disclosure.

Even apart from the Constitution, the failure to disclose the Special Trial Judge's Report violates the appellate review statute. The courts of appeals have a statutory duty to review Tax Court's decisions "in the same manner and to the same extent" as they review district court decisions in non-jury civil cases. 26 U.S.C. § 7482. The failure to disclose the Special Trial Judge's report makes this impossible.

As described above, reports and recommendations of special masters, magistrate judges, and bankruptcy judges are publicly available components of the record when a case is appealed from the district court to the court of appeals. These are necessary in order for the court of appeals to engage in meaningful appellate review of the district courts' decisions.

To evaluate the Tax Court's decision for compliance with Rule 183(c) and to properly employ the legally controlling clearly erroneous standard of review, the court of appeals similarly requires access to the report and findings of the Special Trial Judge. The failure to provide the courts of appeals with that report renders impossible review in the same manner and to the same extent as review of decisions of the district courts. That is a violation of 26 U.S.C. §7482. *Cf. Sumner* v. *Mata*, 449 U.S. 539, 549 (1981) (holding that

federal courts would improperly frustrate intent of habeas corpus statute by issuing boilerplate statements that they had considered the state record as a whole and concluded that the state appellate court's factual determinations were not fairly supported by the record as a whole). For further argument that the Tax Court practice violates 26 U.S.C. § 7482, see Brief *Amica Curiae* of Professor Leandra Lederman in Support of Petitioners.

The Commissioner has never responded to the argument that, if the Rule requires any deference at all, due process must require the original findings to be part of the record. Instead, the government asserts that the Rule requires no deference at all. As the next Sections show, that interpretation defies the text and history of the Rule, and even were that reading correct, due process would still require the Tax Court to include the report in the record.

II. RULE 183(C) ESTABLISHES A CLEARLY ERRONEOUS STANDARD OF REVIEW.

Tax Court Rule 183 specifies that the reviewing Tax Court judge must give "due regard" to the trial judge's "opportunity to evaluate the credibility of witnesses" and that the "findings of fact recommended by the special trial judge shall be presumed to be correct." Those familiar terms permit the Tax Court to reject the Special Trial Judge's factual findings only if clearly erroneous. That is the conclusion the D.C. Circuit reached in a detailed analysis authored by Judge Williams fifteen years ago in *Stone* v. *Comm'r*, 865 F.2d 342, 345 (D.C. Cir. 1989). See also *Landry* v. *FDIC*, 204 F.3d 1125, 1133 (D.C. Cir. 2000) (relying on *Stone*). Yet the government contends that Rule 183(c) does not require any level of deference to the findings of the trial judge who presided over this five-week trial. Opp. at 15.

The government's position disregards the Rule's text and ignores its history. Even if the Rule required no deference at

all to trial judge findings, suppressing those findings from the record would still violate due process. See *infra* at pp. 34-42. But the Rule does require the Tax Court to perform "clear error" review.

A. The Rule By Its Plain Meaning Establishes A Clearly Erroneous Standard of Review.

The plain meaning of a rule that requires trial judge findings to be "presumed . . . correct" and to be given "due regard" is that the Tax Court judge must defer to those findings. In asserting that the rule requires no particular level of deference, the government would read this presumption out of the rule.

Moreover, the terms "presumed to be correct" and "due regard" are well known to American law. These phrases mean that findings shall be reviewed under a "clearly erroneous" standard. As *Stone* concluded, these terms reflect "language with a reasonably well-established meaning" whose "natural reading" is review only for clear error. 865 F. 2d at 347. Indeed, this Court has equated "the presumption of correctness that attaches to factual findings" with the "clearly erroneous" standard of review. See, *e.g.*, *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 500 (1984). The habeas corpus statute expressly states that state court findings of fact "shall be presumed to be correct" by the federal courts, and that statute, too, has been held by this Court to permit rejection of state court factual determinations only after giving great deference to the state court's findings. See *Sumner* v. *Mata*, 449 U.S. 539 (1981) (so holding and reversing on the ground that the opinion of the court of appeals had not given any indication whether the correct level of deference had been paid).

The use of a "presumption" with respect to a "finding" imposes a "standard of review." See *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 623-625 and n.15 (1993). When a higher-level

body instead is to have *de novo* power over factfinding, it is easy enough to specify that. See, *e.g.*, Fed. R. Civ. Pro. 53 (g)(3) (District Court "must decide *de novo* all objections to findings of fact made or recommended by a master . . ."). We have found no federal statute or rule where the phrases "due regard" and "presumed to be correct" are associated with *de novo* review or license a reviewing judge or court to give "no deference" to the hearing officer's factual findings. As Judge Williams concluded in *Stone*: "If a simple 'preponderance' of the evidence – half plus a little bit – suffices to overturn the factual findings of a Special Trial Judge, then it is difficult to see what value or force attaches to the presumptive correctness of that judge's factual determinations, much less the 'due regard' owed 'to the circumstance that the [Special Trial Judge] had the opportunity to evaluate the credibility of witnesses.'" *Stone*, at 347.

B. The History and Context of Rule 183 Confirm This Plain Meaning.

The history of the adoption of Rule 183 supports the conclusion that the Rule means what it says. The language now contained in Rule 183(c) was originally taken from Rule 147(b) of the former Court of Claims.[14] When the Tax Court

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[14] Rule 147(b) of the former Court of Claims read:

> (b) **Trial Judge's Report**. The court may adopt the trial judge's report, including conclusions of fact and law, or may modify it, or reject it in whole or in part, or direct the trial judge to receive further evidence, or refer the case back to him with instructions. *Due regard shall be given to the circumstance that the trial judge had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the trial judge shall be presumed to be correct.*

adopted the language now codified in Rule 183(c) (which at the time referred to "commissioners") the Tax Court clarified in an explanatory note that it was drawing directly on the Court of Claims rule:

> [T]he commissioner's findings of fact * * * are accorded special weight insofar as those findings are determined by the opportunity to hear and observe the witnesses. In this regard, see Court of Claims Rule 147(b). * * * This rule is intended to make the use of commissioners more effective, and to provide procedures more comparable to those which obtain in the Court of Claims.

Tax Ct. R.182(d), *26 U.S.C. App. (1976)*, 60 T.C. 1150.

When the Tax Court adopted this rule in 1973, it was clear that the Court of Claims rule, with its "due regard"/"presumed to be correct" language, embodied a clearly erroneous standard of review. See *Elmers* v. *United States*, 172 Ct. Cl. 226, 232 (1965) (objector bears "burden of showing that the commissioner's finding is clearly erroneous"); see also Court of Claims Committee of the Bar Ass'n of D.C., MANUAL FOR PRACTICE IN THE UNITED STATES COURT OF CLAIMS 7 (1976) ("once a trial judge has rendered his fact findings, the court accords great weight thereto and will not lightly overturn such determinations by its trial judges."); *J.G. Watts Constr. Co.* v. *United States*, 355 F.2d 573, 579 (Ct. Cl. 1966).

Thus, when the Tax Court adopted Rule 182 and then renumbered it as Rule 183, it borrowed a highly deferential standard of review for STJ findings. That is what the D.C. Circuit held in *Stone* v. *Comm'r*, 865 F.2d 342 (D.C. Cir. 1989). The *Stone* court examined "the natural reading" of

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Court of Claims Rule 147(b), 28 U.S.C. App. (1976) (emphasis added), *rendered nugatory*, Claims Court Rules Foreword, 28 U.S.C. App. (1982).

Rule 182's text, the legislative history of the Rule, and the use of similar language in other areas of federal law. It concluded that, by adopting the "due regard"/"presumed to be correct" formulation, the drafters "sought to establish the relatively high level of deference that the phrase 'clearly erroneous' entails." 865 F.2d at 344. The court rejected the argument that the Rule requires no deference at all or only a "mild presumption in favor." *Id.* As *Stone* concluded, the "natural reading" of the Rule imposes a "clearly erroneous standard." *Id.*

Since *Stone,* commentators have understood Rule 183 to continue to establish a "clearly erroneous" standard. 35 AM. JUR. 2d *Fed. Tax Enforcement* § 905 (2002) ("The Tax Court is required to review a special trial judge's factual findings according to the clearly erroneous standard."); 20A FEDERAL PROCEDURE, L. ED., INTERNAL REVENUE § 48:1274 (2000) (same).

The government does not dispute that *Stone* was correct when decided. The government concedes that, at least until 1983, the Tax Court rule did embody a "clearly erroneous" standard. But the government suggests that the role of the Tax Court and the STJ dramatically changed in 1983 when the Tax Court amended the rule that *Stone* had interpreted. See Opp. at 16 (arguing that *Stone* was decided under "the prior rules of the Tax Court"). According to the government, the 1983 amendment transformed the relationship that had existed since 1944 between the Tax Court and its Special Trial Judges (or commissioners). The government's litigation position is that the 1983 amendments turned Tax Court judges into original factfinders and diminished the role of the Special Trial Judge into something akin to a staff attorney. See Opp. 16-17.

Yet the 1983 Rule change did only one thing: it eliminated, without explanation, the sentence in the Rule that required routine disclosure of the STJ's reports. Both before

and after the 1983 amendments, the relevant Tax Court rule has provided that "Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Elimination of the rule mandating publication of the STJ's Report no more changes the role of the Tax Court in reviewing such a report than ending publication of Courts of Appeals' decisions would change this Court's nature as a reviewing court.

And indeed, in *Freytag*, this Court already discussed and rejected the government's argument that a Special Trial Judge acting as here under 26 U.S.C. § 7443A(b)(4) serves "only as an aide to the Tax Court judge responsible for deciding the case." 501 U.S. at 880. Special Trial Judges "exercise significant discretion" when they "take testimony . . . [and] conduct trials," even where they are not authorized to make the final decision of the Tax Court – indeed, these actions and decisions have sufficient legal weight that they constitute an exercise of the judicial power of the United States. 501 U.S. at 882.

The Rule by its terms continues to require the Tax Court to "presume correct" STJ findings. The Tax Court did not, in any contemporaneous publication, interpretive guideline, or any other statement of policy publicly announce then – nor has it at any time since 1983 through today – that the new Rule 183 had fundamentally altered the role of the Tax Court and of its trial judges. The government's position that eliminating *disclosure* changed the *substantive standard of Tax Court review,* overturning the "clearly erroneous" standard recognized in *Stone,* is a post-hoc litigation position. If nothing else, *Stone* put the Tax Court on notice that the court of appeals, in a carefully considered opinion, read the Rule to establish a "clearly erroneous" standard. Yet the Tax Court has not changed the rule since *Stone.* For all these reasons, "due regard" and "shall be presumed to be correct"

in Rule 183 continue to establish a "clearly erroneous" standard of review.

III. EVEN IF RULE 183 REQUIRED NO DEFERENCE AT ALL, DUE PROCESS WOULD STILL REQUIRE RELEASE OF THE SPECIAL TRIAL JUDGE'S REPORT.

Even were the government correct that Rule 183 permits the Tax Court to give no deference at all to the findings of trial judges, due process would still require disclosure of the trial judge's Rule 183 report.

A. Nondisclosure Violates Due Process on Appeal.

First, due process on appeal is violated if the record fails to include the trial judge's report. The courts of appeals are legally required to review for "clear error" the findings of fact in Tax Court decisions. 26 U.S.C. §7482(a); *Duberstein, supra.* That includes findings of fraudulent intent. See, *e.g.*, *Pittman* v. *Comm'r*, 100 F.3d 1308, 1312-13 (7th Cir. 1996).

But the very concept of "clearly erroneous" review *requires* that the findings of an initial trial judge or factfinder be part of that review process. That is so whether or not the tribunal whose ultimate decision is under review is required by its own rules to defer to those findings; the reviewing courts must themselves have access to those findings to perform proper "clear error" review of the facts contained in the final decision under review.

This Court has explained many times that the findings of the original trier of fact are critical to engaging in proper appellate review for "clear error." See, *e.g.*, *Anderson,* 470 U.S. at 564 ("When findings are based on determinations regarding the credibility of witnesses, [the clearly erroneous standard] demands even greater deference to the trial court's findings.") (citations omitted); *United States* v. *United States Gypsum Co.* 333 US 364, 395 (1948).

This is the essential point Judge Cudahy recognized in dissenting below: "it is integral to the standard of clear error review that there be deference to the credibility findings of the official who has actually heard the witnesses." Pet. App. 90a. "If we are to give 'even greater deference' to the findings of a judge who has heard the witness whose credibility is at stake, we must inevitably give less deference to the judge who subsequently reverses those findings." *Id.*

This same principle is a foundational one even in contexts, such as judicial review of agency decisions, that do not involve a formal trial before a judicial institution such as the Tax Court. In a landmark decision, this Court long ago recognized the importance of the initial report of a hearing examiner to accurate appellate adjudication of an agency's final decision. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 496 (1951). As Justice Frankfurter wrote, "evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion . . . The significance of [the presiding judge's or examiner's] report, of course, depends largely on the importance of credibility in the particular case." The Court so held whether or not the Board was itself required, under its own rules, to give any particular level of deference to the hearing officer.[15]

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[15] Applying substantial evidence review even in the merely administrative context, lower courts regularly overturn agency decisions when they conflict with findings of an initial hearing officer and the agency fails adequately to explain or justify its rejection of those original findings. In the Board of Immigration Appeals context, for example, see *Mayo* v. *Ashcroft*, 317 F.3d 867, 871 (8th Cir. 2002) (BIA cannot reverse an Immigration Judge's credibility findings without a "legitimate articulable basis"); *Abdulai* v. *Ashcroft*, 239 F.3d 542, 555 (3d Cir. 2001) (reversing and remanding "[b]ecause the BIA's failure of explanation [for its

This is not a technical principle of administrative law; it states a general principle that accurate appellate review *requires* review on the whole record when tribunals divide factfinding between one who takes evidence and hears witnesses and one who renders ultimate decision – even in mundane cases. The reviewing court must have access to the original findings of fact, otherwise it cannot properly evaluate (under either the "clear error" or the "substantial evidence" standard) the factual foundation for a tribunal's ultimate decision. This is an essential attribute of accurate and fair adjudication – all the more so in formal adjudications, such as this case, where constitutionally protected individual interests are at stake.

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reversal of the Immigration Judge's favorable credibility finding] makes it impossible for us to review its rationale"); *Diallo* v. *INS*, 232 F.3d 279, 288-90 (2d Cir. 2000) (same). The lower courts uniformly impose these requirements notwithstanding that the decision under review in an immigration case is that of the BIA, not that of the Immigration Judge. See, *e.g.*, *Abdulai*, 239 F.3d at 554 (so holding).

In the context of social-security appeals, see *Bauzo* v. *Bowen*, 803 F.2d 917 (7th Cir. 1986) (requiring explicit justification for Social Security Appeals Council's reversal of credibility determinations made by ALJ); *Parker* v. *Bowen*, 788 F.2d 1512 (11th Cir. 1986) (same); *Lopez-Cardona* v. *Sec. of Health and Hum. Serv.*, 747 F.2d 1081 (1st Cir. 1984) (same); *Parris* v. *Heckler*, 733 F.2d 324 (4th Cir. 1984) (same); *Beavers* v. *Sec. of Health, Ed., & Welfare*, 577 F.2d 383 (6th Cir. 1978) (same). In the context of appeals from decisions of the Merit Systems Protection Board, see *Haebe* v. *Department of Justice*, 288 F.3d 1288, 1301-02 (Fed. Cir. 2002) (so holding, and explaining that "[o]ur review is to determine whether the MPSB had substantial evidence to [support its final decision], but in evaluating substantial evidence we review whether the MPSB properly applied the demeanor-based deference requirement [established by the court's precedents]").

The facts in dispute here are not routine matters of historical or documentary record. They involve judgments of intent and credibility. Nor was this some quick, informal hearing before an administrative officer. This was a five-week trial before a Special Trial Judge in a court of law. Trial judge findings involving credibility always demand "special deference," even more when "trial judges have lived with the controversy for weeks or months instead of just a few hours." *Bose*, 466 U.S. at 516. As Judge Cudahy observed,

> the present case was inordinately long and complicated, and the resolution of issues required the synthesis of multiple witnesses' testimony that was separated by days or even weeks (and by hundreds or thousands of pages in the transcript). Whatever advantage is to be gained by a first-hand observation of witnesses is multiplied exponentially when the trial is so long and the transcript so voluminous. The detailed interconnection of the credibility of different witnesses on different factual issues makes the accumulated impressions of the presiding officer irreplaceable.

Pet App. 93a. The Tax Court's final opinion contains numerous credibility determinations.[16] Tax Court cases tried to Special Trial Judges often involve such credibility determinations.[17] As Judge Cudahy further explained: "I can think of no single item of more significance in evaluating a

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[16] See *supra* note 10.

[17] See, *e.g.*, *Williams* v. *Comm'r*, 86 T.C.M. (CCH) 104 (2003); *Durham Farms #1* v. *Comm'r*, 79 T.C.M. (CCH) 2009 (2000); *Merino* v. *Comm'r*, 74 T.C.M. (CCH) 370 (1997).

Tax Court's decision on fraud than the unfiltered findings of the STJ who stood watch over the trial." *Ibid.* [18]

The trial judge or initial factfinder plays a critical and unique role in formal adjudication, particularly where credibility judgments are involved. The trial judge's recommended findings frequently provide the ultimate decision-maker, as in the Tax Court, with the only means through which it can consider the credibility of trial witnesses. See *United States* v. *Raddatz*, 447 U.S. 667, 681 n. 7 (1980) ("we assume it is unlikely that a district judge would reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach"). Due process requires that this unique role and function of the trier of fact be properly respected. That is particularly so here, where the Tax Court itself heard no witnesses and took no new evidence.

The point is not that the Tax Court must hear the witnesses before reversing the Special Trial Judge's findings. The point is that the record fails to reflect whether the Tax Court modified or reversed its trial judge's findings and, if so, on what basis. The Tax Court must let the parties and the

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[18] The Tax Court procedure independently violates Article III of the Constitution. That provision vests in the Courts of Appeals the "judicial power" of the United States. In denying the possibility for meaningful adjudication of the questions of whether there is clear error in the Tax Court's findings of fact and whether that court has complied with the command of Rule 183, the refusal of access to the findings of the judge who tried this case violates Article III. The procedure used by the Tax Court under which the Report is not available to the Courts of Appeals "remove[s] '"the essential attributes of the judicial power,"' from th[ose] Article III tribunal[s]." *Thomas* v. *Arn*, 474 U.S. 140, 154 (1985) (citations omitted).

reviewing courts know whether its findings are based on credibility judgments made by the trial judge, who heard the witnesses and tried the case, or by a subsequent decisionmaker, who did not. Even if the Tax Court owes no deference to the Special Trial Judge's findings, the Tax Court's practice still precludes the court of appeals from performing proper clear error review, which requires review of a record that includes the trial judge's findings.

B. Nondisclosure Also Violates Due Process Before The Tax Court.

Second, even if the government were correct and Rule 183 required no deference to the trial judge's findings, the Tax Court's practice of keeping secret the report of the judge who tried the case would violate the parties' due process rights before the Tax Court.

Regardless of the legal weight Special Trial Judge reports carry, they contain critical evidence – surely the most critical evidence – considered by the Tax Court in rendering its decision. On this point there is no disagreement. See Opp. 15-16. Indeed, the Tax Court heard no witnesses and took no evidence; the *only* materials and evidence before it were the trial judge's report and the trial record. The Tax Court's decision could not have been based on anything else.

This Court long ago made clear that judicial decisions must be based upon a record that is available to the parties. Judicial actors must disclose the documentary and other information upon which they rely in making their decision. Knowledge of the basis upon which one's case is decided is an essential attribute of the adjudication that due process requires. *West Ohio Gas Co.* v. *Public Utilities Comm'n of Ohio*, 294 U.S. 63 (1935) (per Cardozo, J.) (finding a violation of due process where the basis of a public utility commission's decision could not be known to the parties or the reviewing court because "[a] hearing is not judicial, at least in any adequate sense, unless the evidence can be

known."); *see also, e.g.*, *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (even in the parole context, due process requires a "written statement by the factfinders as to the evidence relied on and reasons for revoking parole"). Indeed, litigants are entitled to an opportunity to supplement, comment on, or explain any materials on which a court bases its decision. See, *e.g.*, *Ohio Bell Tel. Co.* v. *Public Utilities Comm'n of Ohio*, 301 U.S. 292, 302-303 (1937); *Morgan* v. *United States*, 304 U.S. 1, 20 (1938) (*Morgan II*).

The Tax Court procedure is so aberrant that we have found not a single example in which a court of law purported to keep any similar report or findings secret. Indeed, New Jersey Chief Justice Arthur Vanderbilt, a leading administrative law scholar, could not even find such a case a half-century ago, when he condemned a similar practice of secret agency factfinding. As he wrote in another landmark due process case, *Mazza* v. *Cavicchia,* 105 A.2d 545, 557 (N.J. 1954), in which the court held such a practice unconstitutional: "We have not been able to find a single case in any state of the Union, nor have any been cited to us, justifying or attempting to justify the use of secret reports by a hearer to the head of an administrative agency. To approve such a practice in deciding an administrative controversy would be to confer on New Jersey the dubious distinction of being the only jurisdiction in the United States to ignore a fundamental element of due process and fair play." There, as here, the state had argued that it could keep the hearing officer's findings secret because they did not legally bind the agency, the ultimate decisionmaker. But the court held that due process required disclosure and a right to contest the hearing officer's findings before the actual factfinder.

Thus, even in routine and less formal administrative hearings, due process has long required that the parties be provided any reports of the hearing officer who heard the witnesses. These same principles underlie this Court's decision in cases like *Gonzalez* v. *United States*, 348 U.S.

407 (1955). The statute there created a right to a hearing in the Department of Justice (DOJ) for persons who asserted conscientious objections to military service. *Id.* at 412 n.3. Gonzalez was given that hearing, and the DOJ, as required by statute, issued a recommended disposition to the decisionmaker with final authority, the Appeal Board. The report was wholly advisory. Even so, this Court overturned, on constitutional and statutory grounds, the refusal of the Appeals Board, the original factfinder, to disclose that DOJ report to the parties. The Court held that "our underlying concepts of procedural regularity and basic fair play" required that "a copy of the recommendation of the Department be furnished the registrant at the time it is forwarded to the Appeal Board, and that he be afforded an opportunity to reply." *Gonzales*, 348 U.S. at 412. The Court explained: "It is true that the recommendation of the Department is advisory . . .. A natural corollary of this, however, is that a registrant be given an opportunity to rebut this recommendation when it comes to the Appeal Board, the agency with the ultimate responsibility for classification." *Id.* at 412-13.

Thus, if the Special Trial Judge's report had no legal weight at all and were somehow only advisory, due process would then require not only disclosure of those findings but an opportunity to address them before the Tax Court. See also *Morgan* v. *United States*, 304 U.S. 1, 19-20 (1938). Indeed, in every other federal judicial context involving a two-tiered adjudication within a tribunal, the parties are entitled not only to receive the report, findings, or tentative conclusions of the first hearing officer, but, consistent with *Gonzales*, to respond to those materials before the final adjudicator makes a decision.[19]

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[19] See, *e.g.*, 28 U.S.C. § 636(b)(1)(B) (magistrates); FED. R. BANKR. P. 9033; FED. R. CIV. P. 53(f) (special masters); Ct. Int'l Trade R. 53(e); 5 U.S.C. § 557 (agencies).

This requirement only makes sense: if the findings of the trial judge carry legal weight before the Tax Court, the parties are provided a meaningful hearing through their appearance and arguments before the trial judge. But if those findings carry no weight, the trial before the Special Trial Judge provides the parties contesting the facts essentially no meaningful process; the trial judge has no legal power to affect the ultimate decision. In that case, only an adequate process before the Tax Court itself, involving access to the recommended findings and an opportunity to address them, would suffice for due process. It is the opportunity to make one's case before a relevant factfinder that is protected by the due process clause, which is what this Court's decisions in cases like *Gonzalez* hold.

IV. DISCLOSURE OF THE SPECIAL TRIAL JUDGE'S REPORT IS INDEPENDENTLY REQUIRED BY STATUTE.

A. The Rule 183 Report Must be Disclosed by Statute.

1. Even were it not constitutionally required, disclosure of the Special Trial Judge's report would still be mandated by the statutes that govern the Tax Court. At a minimum, these statutes should be construed to avoid the serious due process concerns otherwise raised.

Section 7461(a) of the Code requires that "*all reports* of the Tax Court and all evidence received by the Tax Court * * * shall be public records." 26 U.S.C. § 7461(a) (emphasis added). Similarly, § 7459(b) requires that the Tax Court "shall report in writing *all* its findings of fact, opinions, and memorandum opinions." 26 U.S.C. § 7459(b). (emphasis added). Section 7461 contains only a narrow exception to this obligation of transparency: the Tax Court may exempt from disclosure trade secrets or other confidential information. See 26 U.S.C. § 7461(b).

Special Trial Judge reports are included among "all reports of the Tax Court" within the meaning of the statute. The statute does not refer, as the Government suggests, only to reports issued by the entire Court. See, *e.g.*, *Louisville & N. R. Co.* v. *Comm'r*, 641 F.2d 435, 443 (6th Cir. 1981) (referring to "[t]he initial report of the Tax Court in this case, issued by the assigned special trial judge"). The trial judge's report contains the considered findings and conclusions of an official who has exercised the Tax Court's judicial power in trying the case. *See Freytag*, 501 U.S. at 880-82; 26 U.S.C. §§ 7443, 7443A. That judicial officer issues what the Tax Court's own rules declare to be a "report." Tax Ct. R. 3(d). Section 7461 does not distinguish between final and interim reports, or between internal and external reports. Nothing in the Code authorizes the Tax Court to exempt STJ "reports" from the statutory command that "all reports" of the Tax Court "shall be public records."

And if these reports somehow were not among the reports of the Tax Court covered by the statute, they would have to amount to "evidence" that is considered by that court in rendering its decision and that must be made a public record under Section 7461(a). Because the report of the judge who heard the witnesses is essential to the Tax Court's assessment of their credibility, it is, at the very least, a particularly important piece of evidence before the Tax Court. *Cf. Erhard* v. *Commissioner*, 46 F.3d 1470, 1476 (9th Cir. 1995) (discussing reliance of Tax Court on STJ findings).

The public-records requirement imposed by Congress is broad and cannot be evaded by placing a novel label on a document on which the Tax Court has relied in rendering its decision. Congress specifically and intentionally drafted these transparency requirements to include "all" reports, "all" evidence received, "all" findings of fact, "all" opinions, and "all" memorandum opinions. These statutes require disclosure of the reports of Tax Court trial judges – and

should be construed to do so in light of the due process issues suppression of these reports otherwise presents.

2. Congress enacted these statutes against the longstanding common-law right of access to judicial records. To the extent there is any ambiguity, therefore, the statutes should be construed, consistent with that right, to require disclosure.

The American legal tradition has long recognized a common-law right of access to judicial records and documents. See, *e.g.*, *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) (common-law right). Congress should be presumed aware of this tradition and the common-law right, which "antedates the Constitution." *Bank of Am. Nat'l Trust & Savings Ass'n* v. *Hotel Rittenhouse Assoc.*, 800 F.2d 339, 343 (3d. Cir. 1986). This right, which applies to civil cases,[20] generates a strong presumption of access to "public records and documents, including judicial records and documents." *Nixon*, 435 U.S. at 597. This right exists both to protect the interests of litigants and to secure "the citizen's desire to keep a watchful eye on the workings of public agencies." *Id.* at 598. Indeed, the Tax Court itself has recognized that this right attaches to its own proceedings. "As a general rule, common law, statutory law, and the U.S. Constitution support the proposition that official records of all courts, including this Court, shall be open and available to the public for inspection and copying." *Willie Nelson Music* v. *Comm'r*, 85 T.C. 914, 917 (1985). See also *id.* at 919 ("In these cases, members of the public have an interest in free access to the facts and in understanding disputes that are presented to this forum for resolution. They also have an

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[20] See, *e.g.*, *Publicker Indus., Inc.* v. *Cohen*, 733 F.2d 1059, 1066-67 (3d Cir. 1984); *Smith* v. *United States Dist. Court for the S. Dist. of Ill.*, 956 F.2d 647, 650 (7th Cir. 1992); *Wilson* v. *Am. Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985).

interest in assuring that courts are fairly run and judges are honest.").

In identifying a "judicial record" to which the presumption of access applies, the overarching principle is that such records consist of all "materials on which a court relies in determining the litigants' substantive rights." *FTC* v. *Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987); see also *United States* v. *El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997) ("what makes a document a judicial record and subjects it to the common law right of access is the role it plays in the adjudicatory process"); *Smith* v. *United States Dist. Court Officers*, 203 F.3d 440, 442 (7th Cir. 1999) (it is "a right of access to those records of a proceeding that are filed in court or that, while not filed, are relied upon by a judicial officer in making a ruling or decision."); *Smith* v. *United States Dist. Court for the S. Dist. of Ill.*, 956 F.2d 647, 650 (7th Cir. 1992) (granting access to memo sent by Clerk of Court to all judges because, *inter alia*, trial judge specifically stated that he had relied on it in making his decision); *Joy* v. *North*, 692 F.2d 880, 894 (2d Cir. 1982); *Wash. Legal Found.* v. *U.S.S.C.*, 89 F.3d 897, 905 (D.C. Cir. 1996); *United States* v. *Martin*, 749 F.2d 964, 968 (3d Cir. 1984). The common-law right extends even to judicial documents that merely shed light on the bases for judicial decisions. See, *e.g.*, *Brown & Williamson* v. *FTC*, 710 F.2d 1165, 1181 (6th Cir. 1983) (noting public interest "in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions"); *Joy* v. *North*, 692 F.2d at 894 (requiring that "a report" used in rendering judgment be revealed: "[s]ince it is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny.").

Under these principles, there is little doubt that the press, the public, and the litigants have a common-law right of access to the STJ's report. See, *e.g.*, *Smith*, 203 F.2d at 441

(Posner, J.) ("The public, including the parties to a suit, have a right of access to the records of a judicial proceeding."); see also *Brown & Williamson*, 710 F. 2d at 1177 (acknowledging First Amendment right of access to judicial documents).[21] The STJ's report is more significant than documents that "might" merely have affected a judicial decision. That report contains findings the Tax Court is required to treat as "presumed correct." The Tax Court has never articulated any legitimate interest, or any interest all, for starting to suppress this material in 1983. To the extent unique interests arise in specific cases, such as privacy or trade secrets, ample means to protect those interests exist. See *Nixon,* 435 U.S. at 598 ("access has been denied where court files might have become a vehicle for improper purposes.").

That every federal judicial institution would routinely disclose analogous findings and reports, and that they would be required to do so as a matter of common-law right, counsels in support of construing the Tax Court disclosure statutes to provide access to the STJ reports. See *Nixon,* 435 U.S. at 602.

B. Sections 7461 and 7459 Were Intended To Eliminate Secrecy With Respect To Initial Determinations Like Those Contained In The Special Trial Judge's Report.

As the context in which these provisions were enacted demonstrates, Congress has considered secrecy in tax proceedings a particularly grave problem of public administration virtually since the inception of the income tax. Sections 7461 and 7459 were designed precisely to ensure disclosure of documents involved at all stages of tax proceedings, including documents that contain preliminary findings of fact and conclusions of law.

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[21] The First Amendment issues at stake also counsel in favor of reading the statutes to require disclosure.

Refusal to disclose STJ reports is the type of practice that Congress intended to prevent when it first created the Board of Tax Appeals, the predecessor to the Tax Court. As initially proposed in 1924, the bill to create the Board of Tax Appeals generated intense debate about fair and open process in conflicts between the government and taxpayers. The executive's initial proposal required only that "[t]he proceedings of the Board shall be informal and in accordance with such rules as the Board . . . may prescribe." Dubroff, HISTORICAL ANALYSIS at 60.

A minority, led by Senators Jones and Walsh, objected vehemently and proposed a floor amendment:

> "Under the present practice all [resolutions of tax disputes] are made in secret. An opportunity is afforded for favoritism, arbitrary action, fraud, and collusion. * * * *The majority proposes that all records and proceedings of the Internal Revenue Bureau shall remain secret as in the past.* To the minority it seems inconceivable that any controversy existing between the Government and a taxpayer should be adjudicated and finally determined in a star chamber proceeding. The minority will, therefore, propose an amendment to the bill which will provide that *all such proceedings, records, and evidence in connection therewith shall be public.*"

S. Rep. No. 68-398, pt. 2, at 12 (1924) (emphasis added).

The Jones-Walsh amendment contained substantially the same transparency language that now exists in Sections 7461 and 7459.[22] The purpose was to ensure that all phases in the

[22] As enacted the statute read in relevant part: "It shall be the duty of the board . . . to make a report in writing of its findings of fact and decision in each case a copy of its report shall be entered of record and a copy furnished the taxpayer. . . . All reports of the Board . . . and all evidence received by the Board . . . shall be

adjudication of tax disputes would be subject to public scrutiny, for the benefit of both taxpayers directly affected and for public assessment of tax controversies more generally. As one sponsor put it: "[I]t is of much greater concern that those judicial proceedings should be public and become permanent records and open to a public inspection, so that we may understand the facts upon which decisions are reached, and the taxpayers in the country may have an opportunity to know just how it all happens." Cong. Rec. S. 8133 (1924) (Sen. Jones). As the other sponsor said: "the proceedings ought to approximate as nearly as practicable to proceedings in court." Id. (Sen. Walsh).

The Senate debates underscore the aim of abolishing all vestiges of secrecy. Senator LaGuardia observed that the "board of appeals and the publicity placed upon its activities are the result of the vicious secrecy system which has grown up in the Treasury Department under the present law." 65 Cong. Rec. 9549 (1924). Most importantly, this requirement of transparency applied not only to final proceedings, but to *every* stage of tax litigation. Senator Jones stated that:

> whenever there is a controversy between the Government and a taxpayer, *the proceedings leading up to that decision should be public proceedings*. [Proceedings and records should be] open to a public inspection, so that we may understand *the facts upon which decisions are reached*, and the taxpayers in the country may have an opportunity to know just how it all happens.

65 Cong. Rec. 8132-34 (emphasis added). Accordingly, the Senate Report was clear that the enacted disclosure requirements encompassed not only final decisions of the

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public records open to the inspection of the public. . . . " Section 901(h) of the Revenue Act of 1924, Pub. Law No. 68-176.

Board, but all "records * * * in connection therewith." S. Rep. No. 68-398, pt. 2, at 12 (1924).

At the time of the adoption of Section 7461, the "reports" of the Board of Tax Appeals had less legal weight than the Special Trial Judge's reports do today. "The hearing before the Board was at that time little more than a preliminary skirmish, a run for luck. For either party, if dissatisfied with the decision, could bring a court action and try the matter de novo, the Board's findings of fact being prima facie evidence against the losing party." *Blair* v. *Curran*, 24 F. 2d 390, 392 (1st Cir. 1928). That Congress intended for publication of such findings to be mandatory is further reason that Sections 7461 and 7459 should be construed to require disclosure of the STJ reports today.

V. THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER TO REQUIRE DISCLOSURE OF THE SPECIAL TRIAL JUDGE'S REPORT.

Finally, this case calls for an exercise of this Court's supervisory power over the federal courts, appropriate when the lower courts have "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court . . .." S.Ct. R. 10(a).

"The authority which Congress has granted this Court to review judgments of the courts of appeals undoubtedly vests us not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them." *Lehman Brothers* v. *Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring); see also 28 U.S.C. § 2106. As the Court recently noted, "this Court can establish rules of 'sound judicial practice'" through the exercise of "supervisory power" over the courts whose decisions are subject to its review. *Intel Corp* v. *Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2483 (2004) (quoting *Thomas* v. *Arn*, 474 U.S. 140, 146-47 (1985)). This Court is

empowered to impose on the lower courts "procedures deemed desirable from the viewpoint of sound judicial procedure though in nowise commanded by statute or by the Constitution." *Thomas*, 474 U.S. at 146-47. This supervisory power focuses on "the need to protect the integrity of the federal courts," see, *e.g.*, *United States* v. *Payner*, 447 U.S. 727, 736 n.8 (1980), and to secure "the public reputation of judicial proceedings." *Nguyen* v. *United States*, 123 S. Ct. 2130, 2139 n.17 (2003).

In *Nguyen*, the Court employed its supervisory power to invalidate the judicial practice at issue even without a showing of individual prejudice to the specific defendant. That approach should apply *a fortiori* to a situation in which the court of appeals has decided a case without access to the trial judge's findings of fact to the actual prejudice of the appellate court's ability properly to render a "judicial" decision. This Court should not permit the courts of appeals to review decisions from the Tax Court on the basis of an incomplete record that lacks the findings of the one judge who heard the witnesses and presided at trial.

To attempt to engage in the appellate function without access to the trial judge's report, as the court below was forced to do by the Tax Court's refusal to provide that report, so far departs from the "accepted and usual" course of judicial proceedings – indeed, from the proceedings of every other court – as to warrant exercise of this Court's supervisory power. So too does the process within the Tax Court of refusing to disclose to the parties or the reviewing court the trial judge's findings and report.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Dated: August 2, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-61075

In Re: ESTATE OF ROBERT W. LISLE; ESTATE OF DONNA M. LISLE; THOMAS W. LISLE, Independent Co-Executor; AMY L ALBRECHT, Independent Co-Executor,

Petitioners,

Petition for Writ of Mandamus
to the
United States Tax Court

Before JOLLY, SMITH, and WIENER, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the Petitioners-Appellants' Motion to Enforce This Court's Mandate, treated as a petition for write of mandamus, is DENIED.

Although Petitioners-Appellants present a compelling case that, on remand from our opinion filed July 30, 2003, the Tax Court's stated intention to "add new penalties based on negligence, substantial understatement of income and tax-motivated interest" will exceed the strictures of our limited mandate, we remain mindful of the Supreme Court's admonition that mandamus is not to be used as a substitute for appeal. Despite the implication of the Tax Court's orders

of November 19, 2003, and the inferences reasonably drawn therefrom by Petitioners-Appellants, that Court has not issued its final judgment. Thus it is impossible to tell whether, on remand, the Tax Court will in fact exceed the narrow limits of our remand, which permits only a recalculation of tax in light of that portion of the Tax Court's original judgment that we reversed. If, in the certain knowledge that its impending judgment whether it exceeds our mandate on remand, the Tax Court does – as appellants suggest – "go much further," that contention can be dealt with in the appellate process. We trust that, in the final analysis, the Tax Court will not make yet another reversal necessary.

MOTION DENIED.

U.S. COURT OF APPEALS
FILED
JAN 7 2004
CHARLES R. FULBRIDGE III
CLERK

UNITED STATES TAX COURT
WASHINGTON, DC 20217

ESTATE OF ROBERT W. LISLE, DECEASED, THOMAS W. LISLE AND AMY L. ALBRECHT, INDEPENDENT CO-EXECUTORS, AND ESTATE OF DONNA M. LISLE, DECEASED, THOMAS W. LISLE AND AMY L. ALBRECHT, INDEPENDENT CO-EXECUTORS,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket No. 215555-91.

ORDER

On July 30, 2003, the United States Court of Appeals for the Fifth Circuit filed its Judgment in this case, and issued its mandate on September 23, 2003, affirming in part and reversing in part the Decision of this Court entered on July 24, 2001, and remanding the case to this Court for further proceedings in accordance with its Opinion.

The Court of Appeals reversed this Court's finding of fraud with respect to Estate of Robert W. Lisle's additions to tax under section 6653 (b) (1) (A) and (B), Internal Revenue Code, for 1987. However, the Court of Appeals sustained our decision with respect to petitioners' Federal income tax deficiency for 1987. In doing so, the Court of Appeals remanded this case for the limited purpose of recalculating the deficiency and additions to tax, consistent with its Opinion.

Respondent determined in the notice of deficiency dated July 24, 1991, that petitioners were liable for additions to tax for negligence under section 6653 (a) (1) (A) and (B), under section 6661 (a) for a substantial understatement of income, and under section 6621 (c) for additional interest. In the Amendment to Answer filed on July13, 1994, respondent claimed alternatively that these additions to tax and interest, as increased, were due from petitioners in the absence of fraud. Consequently, it is our view that the final decision to be entered in this case should include the amounts of any additions to tax and section 6621 (c) interest that are applicable. Accordingly, it is

ORDERED:

1. That on or before December 29, 2003, the parties are directed to submit an agreed decision to be entered by the Court.

2. That, if the parties are unable to agree on a proposed decision, they are directed to file separate computations and a memorandum explaining their differences.

(signed) HOWARD A. DAWSON, JR.

Howard A. Dawson, Jr.
Judge

Dated: Washington, D.C.
November 19, 2003

Docket Nos. 43966-85, 712-86, 45273-86, 1350-87, 31301-87, 33557-87, 3456-88, 30830-88, 32103-88, 27444-89, 16421-90, 25875-90, 26251-90, 20211-91, 20219-91, 21555-91, 21616-91, 23178-91, 24002-91, 1984-92, 16164-92, 19314-92, 23743-92, 26918-92, 7557-93, 22884-93, 25976-93 and 25981-93

UNITED STATES TAX COURT

INVESTMENT RESEARCH ASSOCIATES, LTD., AND SUBSIDIARIES, et al.,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECLARATION OF RANDALL G. DICK

Randall G. Dick, for his Declaration under penalty of perjury, pursuant to 28 U.S.C. 1746, states as follows:

1. I am of full age, and if called to testify, would be competent to give the testimony as to the following matters.

2. I am counsel for Investment Research Associates, Ltd. and Subsidiaries and for Burton and Naomi Kanter.

3. In its Opinion in this matter filed on December 15, 1999 (T.C. Memo 1999-407) the U.S. Tax Court concluded, with respect to issue 1, that payments made by Hyatt, Frey, Schaffel, Schnitzer and Eulich (the "Five") were taxable to the individual Petitioners and the individual Petitioners were liable for the fraud additions to tax and penalty with respect to such income. (Opinion, 226-319).

4. Subsequent to the issuance of the Tax Court's Opinion, Declarant was informed by two judges of the Tax Court, that in his original report submitted to the Chief Judge pursuant to Rule 183(b), Special Trial Judge D. Irwin Couvillion concluded that payments made by the Five were not taxable to the individual Petitioners and that the fraud penalty was not applicable.

5. In my conversations with the judges of the Tax Court, I was told the following: That substantial sections of the opinion were not written by Judge Couvillion, and that those sections containing findings related to the credibility of witnesses and findings related to fraud were wholly contrary to the findings made by Judge Couvillion in his report. The changes to judge Couvillion's findings relating to credibility and fraud were made by Judge Dawson.

6. Judge Dawson`s revisions resulted in a finding that over nine million dollars is taxable to the individual Petitioners. This finding based upon credibility of witnesses, results in liability of the individual Petitioners for tax, penalties and interest in an amount in excess of $30,000,000.

7. I confirmed the information, in paragraphs 4 and 5 above with another judge of this Court, who informed me that in fact, the Opinion was changed, and that to his knowledge, it was the first time the Tax Court had made an outright rejection of credibility findings made by a Special Trial judge.

8. I was also told by a judge of the Tax Court that the changed sections of the report were written in such a way so that wherever there was the "slightest issue of doubt, it went against" the Petitioners.

I declare under penalty of perjury that the foregoing is true and correct and that this Declaration is executed in San Francisco, California on August 21, 2000.

RANDALL G. DICK